RE HJ ABDUL MAJID KHAN; EX P BANK BUMIPUTRA MALAYSIA BHD

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
LINTON ALBERT J
[BANKRUPTCY NOTICE NO: K-77-1987]
22 APRIL 2005

CIVIL PROCEDURE: *Stay of proceedings - Special circumstances - Bankruptcy - Order of discharge - Creditors and debtor appealing to Court of Appeal - Application to stay proceedings of creditors' appeal - Whether debtor's appeal rendered nugatory if stay refused - Principles applicable*

The debtor, a bankrupt, was granted an order of discharge by the court. Dissatisfied, the (nine) creditors appealed to the Court of Appeal against the discharge order. The debtor applied to strike out the creditors' appeals, but the application was dismissed by Ian Chin J. The debtor appealed to the Court of Appeal against Ian Chin J's decision, and pending that applied to the present court to stay the proceedings on the creditors' appeals. Before the learned Judicial Commissioner, the debtor argued that there existed special circumstances as to warrant the court to grant a stay order. Specifically, it was contended that the issue to be determined by the Court of Appeal concerning the competence or *locus standi* of the creditors to lodge their appeals against the decision to discharge the debtor as a bankrupt involved novel and complex questions of law, and further that, the debtor's appeal to the Court of Appeal would be rendered nugatory if stay is refused.

Held (granting stay):

(1) The principles to be applied in an application for stay of execution are also to be applied to an application for stay of proceedings *(Re Chai Min Sin: Ex Parte MBF Finance Berhad)*. (para 2)

(2) The court would not dwell on other permutations that may arise depending on how the creditors' appeals and the debtor's appeal to the Court of Appeal are determined by this court and the Court of Appeal respectively. In the circumstances herein, the debtor has established special circumstances to warrant a stay of proceedings. (para 4)

Case(s) referred to:

Re Chai Min Sin ex p MBf Finance Bhd [2004] 5 CLJ 272 HC ***(refd)***

Government Of Malaysia v. Kadir Mohamad Mastan & Another Case [1993] 4 CLJ 98 HC ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbaguna Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

For the debtor - Sugumar Balakrishnan; M/s Sugumar & Co
For creditor 1 - Hassan Murtaza; M/s Shelly Yap Leong Tseu Chong Chia & Co
For creditor 2 - Saiful Mokhtar; M/s Jayasuriya Kah & Co
For Director General of Insolvensy - Hasmin Hussin FC

Reported by Rose Aziz

JUDGMENT

Linton Albert J:

[1] This is an application by one Haji Abdul Majid Khan (the debtor) for an order that all proceedings concerning the respective notices of appeal filed on behalf of nine creditors be stayed, pending the determination of the debtor's appeal to the court of appeal against the decision of Ian Chin, given on 19 August 2004 dismissing the debtor's application to strike out all the appeals. The debtor was adjudged a bankrupt on 9 October 1987. The creditors were dissatisfied with the discharge applied for and obtained by the debtor on 22 February 2000. Hence they appealed against that decision and the debtor is now seeking to have proceedings on these appeals stayed.

[2] The principles to be applied in an application for stay of execution are also applicable to an application for stay of proceedings (see *Re Chai Min Sin ex p MBf Finance Berhad* [2004] 5 CLJ 272). The controversy as to whether the nugatory test or the special circumstances test is the more appropriate test has been laid to rest by the Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbaguna Makmur Bhd* [2003] 4 CLJ 1 FC where Augustine Paul delivering the judgment of the court said at p. 16:

> It is clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances. In other words special circumstances is the genus of which nugatoriness is a species. If it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that special circumstances has been established. Thus they cannot be treated as a separate head and one cannot be an alternative to the other. Neither can one be accepted or rejected in favour of the other as they are inter-related.

[3] His lordship had earlier on in his judgment said this:

> The need to establish the existence of special circumstances to enable the court to grant a stay of execution has been well established in this country.

[4] In his written submission learned counsel for the debtor Mr. Sugumar Balakrishnan contended that the matters set out in the debtor's affidavits in support of the application constitute special circumstances which warrant exercise of the court's discretion to grant a stay of proceedings. Apart from the fact that the issue to be determined by the Court of Appeal concerning the competence or *locus standi* of the creditors to lodge their appeals against the decision to discharge the debtor as a bankrupt which, it is argued, involves novel and complex questions of law, the appeal to the Court of Appeal would be rendered nugatory if stay is refused and this would be so if this court proceeds to determine and allow the creditors' appeal because then the debtor would revert to his erstwhile status as a bankrupt. The prospect of this court arriving at a decision the effect of which might well be totally opposite to the outcome of the pending appeal of the debtor before the Court of Appeal ought to be avoided. I need not dwell on other permutations that may arise depending on how the creditors' appeal and the debtor's appeal to the Court of Appeal are determined by this court and the Court of Appeal respectively. In these circumstances I am of the view that the debtor has established special circumstances to warrant a stay of proceedings. It is useful here to be reminded of what Ian Chin (as he then was) said in *Government Of Malaysia v. Kadir Mohamad Mastan And Another Case* [1993] 4 CLJ 098 HC at pp 101-102 which was reproduced with approval in the *Kosma* case:

> An attempt was made to define special circumstances by Raja Azlan Shah (as His Majesty then was) in the case of Leong Poh *Shee v. Ng Kat Chong* [1966] 1 MLJ 86, *viz*:
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> > Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.
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> The definition only serves to emphasize the fact that there are myriad circumstances that could constitute special circumstances with each case depending on its own facts. I am of the opinion that the list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or dose a category would be to impose a fetter on the exercise of the discretion of the court whether to grant or stay an execution; making the discretion less of a discretion. This is surely not what discretion is all about.

[5] In my view, the matters alluded to by the debtor in his affidavits are conceivably within the infinite list of special circumstances envisaged by his lordship in that case.

[6] The application is, for the reasons I have stated, accordingly allowed with costs.